No. 10118

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SCHAEFER-HITCHCOCK COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT SCHAEFER-HITCHCOCK COMPANY

C. H. POTTS,
Attorney for Respondent.

INDEX

AUTHORITIES CITED

No. 10118

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SCHAEFER-HITCHCOCK COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT SCHAEFER-HITCHCOCK COMPANY

C. H. POTTS,
Attorney for Respondent.

JURISDICTION

Respondent does not question the jurisdiction of this Court. The allegation in the Petition for Enforcement that "this Court therefore has jurisdiction of the Petition by virtue of Section 10 (e) of the National Labor Relations Act" (R. 47), is admitted by Respondent in its answer to the petition by failure to deny said allegation (R. 52).

STATEMENT OF THE CASE

The complaint contained two charges of unfair labor practices as follows:

First. That Respondent, by its officers, agents and certain employees, caused, instructed and encouraged the holding of a meeting of its employees at which antiunion statements were made, thereby interfering with its employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8 (1) of the Act (R. 3-4).

Second. That Respondent discharged an employee, Clifford Damschen, because of his union activities, and has refused to reinstate him, and by said discharge and refusal discriminated in regard to his hire and tenure of employment, and has discouraged and is discouraging membership in the Union in violation of Section 8 (3) of the Act. (R. 2-3).

The Board found that Respondent, by instigating and holding said meeting of its employees, by statements made by a foreman during this meeting, and by other statements of employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 35), and concluded that such interference was an unfair labor practice within the meaning of Section 8 (1) of the Act (R. 43).

The Board further found that Respondent, by discharging said employee, Clifford Damschen, on March 19, 1941, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union, and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 41), and concluded that by discriminating in regard to the hire and tenure of employment of Clifford Damschen, thereby discouraging membership in the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act (R. 43).

Respondent has contended throughout the proceedings and now contends that the alleged unfair labor practices charged in the Complaint were not sustained by substantial evidence (R. 13-14-18), and that the Findings of unfair labor

practices are not supported by substantial evidence (R. 53-54).

THE MEETING OF THE EMPLOYEES:

The origin of the meeting of the employees on February 15, 1941, was disclosed in the testimony of one of the employees of respondent, George Willard Cronkright, a pole inspector, who testified as follows (R. 153-155):

Q. Do you recall a meeting of some kind which was held in Priest River on February 15, 1941, by the employees of the Schaefer-Hitchcock pole plant?
A. Yes, sir.

Q. Did you have anything to do with arranging that meeting?
A. I did.

Q. Just what did you do?
A. Well, nothing more than to try and get the boys together and talk the proposition over.

Q. Did you discuss it with anyone else and take some part in arranging the meeting or getting them together?
A. Well, I and Con Wear got them together.

Q. Do you know of anybody else participating in the preliminaries?
A. Ed Gillespie, I believe.

Q. How did you go about getting them together?
A. Well, just told them we would gather up at the Peterson Hotel and would talk the proposition over.

Q. Well, did you take that up with any of

the crew or individually?

A. Oh, not individually; just around throughout the yard, whoever happened to be working with me.

Q. Now, did Mr. Conlee make any suggestion to you about having such a meeting?

A. No, sir.

Q. Did he talk to you about it at all?

A. No, sir.

Q. Or did you talk to him about it?

A. I asked him to come up there.

Q. Oh, you asked him to come up?

A. I did.

Q. What did he say?

A. He said that he did not know: I told him I thought it would be pretty nice for him to come up there and sit in, that he would see how the boys felt.

Q. Did he finally say whether he would or would not?

A. I don't remember whether he told me he would come or not.

Q. However, when the meeting was held he did come?

A. Yes.

On Cross Examination this witness testified as follows (R. 164-165):

Q. Can you tell me how long it was prior to the date of this meeting that you first got the idea that it would be a good idea to get the boys together to discuss it?

A. Only a few days, four or five days.

Q. And Con Wear was the first man you talked to, wasn't it?

A. No, I think Ed Gillespie was the first one I talked with.

Q. You and Con Wear were together making most of the arrangements, weren't you?

A. No, we weren't.

Q. Who assisted you besides Con Wear in making the arrangements?

A. What arrangements do you mean?

Q. The arrangements for the meeting.

A. We just went around to the men we were working with, and while I asked one man that man might turn around and ask another,—understand?

Q. Yes, but you and Con Wear agreed that that was the way to do it?

A. Yes.

The employee Con Wear, a witness for respondent, testified as follows: (R. 169)

Q. Mr. Wear, when did you first hear of the proposition to have this meeting?

A. I don't know whether it was two or three days or three or four days before the meeting.

Q. From whom did you hear about it?

A. George Cronkright, and I believe, Ed Gillespie.

Q. Do you recall just how it came about, as to who first mentioned it or what the circumstances were?

A. No, I can't.

Q. What did you do about it in the way of communicating with others of your fellow workmen there?

A. I believe Mr. Cronkright spoke to several of them and —

Q. Did you tell any of them?

A. I don't remember who I asked. I think I asked certain ones. I asked John Webb if he was going to attend, and he said he did not know if he would or not, and it probably would not amount to anything anyway.

Q. Had you had any conversation with Mr. P. J. Conlee, the foreman, in regard to this meeting at any time before it was held?

A. I did not.

Q. Had he ever suggested to you that there be such a meeting?

A. He had not.

Q. Or had anybody connected with the Schaefer-Hitchcock Company?

A. No, sir.

On Cross Examination this witness testified as follows: (R. 178-179):

Q. Was this February 15 meeting your idea?

A. No, it was not my idea.

Q. I beg your pardon?

A. It wasn't my idea alone.

Q. It was yours and whose else?

A. George Cronkright and Ed Gillespie.

Q. Did you mention it to Cronkright first, or did he mention it to you?

A. I don't know whether it was George Cronkright who mentioned it first, or whether it was I.

Q. You did not start talking about this meeting until you heard there was some talk among the employees of joining a union, did you?

A. I never heard of any talk among the

employees about the union.

Q. Did you hear there was some talk among the employees about a union and that some union organizers had been in town?

A. There had been union organizers in town.

Q. And it was after you heard that that you started this talk about the February 15 meeing?

A. That I started the talk?

Q. Put it this way, it was after you heard the union organizer was in town that you and George Cronkright started talking about the meeting?

A. That is right.

Patrick J. Conlee, the plant foreman, a witness for respondent, testified as follows: (R. 207-208):

Q. Mr. Conlee, it is in evidence that you attended a meeting of the employees held in Priest River on February 15, 1941. How did you happen to attend this meeting?

A. Well, I was invited by Mr. Cronkright and I think Mr. Wear and Mr. Ed Gillespie, who was there at the time. They invited me to attend this meeting.

Q. Did you have anything to do with the calling or holding of that meeting?

A. No, sir.

Q. Did you know it was to be called or held until you were told or invited to come by those gentlemen?

A. No, sir, that was my first intimation of it.

Q. And when was that intimation or invitation given to you?

A. Well, it was just about noon or just before

quitting time; not more than an hour before quitting time.

Q. At noon on Saturday?
A. Yes.

Q. What was your response to them? What did you say?
A. Well, I kind of hesitated. I said I did not think I ought to attend the meeting. They kind of urged me and said it would be a good thing if I went up there, that they would like to have me.

Clifford Damschen, the principal witness for the Board, testified that on February 15th, 1941, he was invited by Con Wear to attend a meeting of the employees of respondent (R. 72), that Con Wear spoke to him on February 15 with reference to the meeting on the main street in Priest River with no one else present, saying: "Clif, we are going to have a little meeting at the Peterson Hotel at 4 o'clock and I would like to have you attend. We are going to discuss this union thing and decide whether to join a union or not". That he asked Wear who was going to be there to represent the union and Wear said this wasn't going to be that kind of a meeting . . . it was just going to be a friendly chat among the workers to see what they thought about unions, that Damschen told Wear he did not believe that would be a very appropriate meeting without someone to discuss the union because none of the boys really know what a

union was and suggested having an organizer there to tell what the union was and that Wear said, "Well, you can have your union men if you want them, but this is just going to be a friendly chat among the workers". (R. 73).

John Webb, the other witness for the Board, testified that he was invited to attend the meeting of the employees by Con Wear, who told him that they were going to have a meeting at the Peterson Hotel to decide whether or not they would have a union, and he would like to have him attend, and that Webb told Wear he had quite a bit of work he was doing around home and felt that there wouldn't be anything said there that would be of sufficient interest for him to come (R. 140-141).

What actually happened at this meeting on February 15, 1941, was disclosed in the testimony of Clifford Damschen and John Webb as witnesses for the Board, and by George Willard Cronkright, Con Wear, Charles E. Leobold, R. E. McKee, and Patrick J. Conlee witnesses for respondent.

According to the testimony of Damschen, approximately 21 of the 26 employees at the plant were present at the meeting (R. 74), and after waiting until a majority of the crew had arrived, Ed Gillespie said, "Well, let's get this thing over with and find out what we are going

to do". Damschen then asked Ed Gillespie who was going to do the talking and Con Wear stated, "Well, our foreman Mr. Conlee, is here with us. He has had some good experience with unions back East, and I believe he can tell us a whole lot about them". (R. 74). Mr. Conlee was the general foreman in charge of the pole yard (R. 74).

After Wear had made the statement about Conlee, Mr. Conlee started to speak and said, "Boys, as far as I can see, everything has been going rosy in the yard. I thought we were getting along swell. And I believe if any of you fellows have any troubles to be settled you could come to me, and if I can't do anything for you, I will go higher. I have had experience with unions back East, they went out on strike and lost much more than they gained by their strike. They can call you out on strike any time they want to and tax you on your dues".

Damschen interrupted Conlee at this point and said he understood that men in the local had the right to vote as to whether they were taxed or went out on strike and Conlee said, "Yes, but they tell you how to vote".

Damschen then suggested that there were several who did not understand what the union was, and that they should have an organizer or someone there to defend the union and make it a two-

sided discussion. Conlee then said, "That would not be a two-sided discussion. Them fellows have answers for every question you ask. They can paint some beautiful pictures, but I never seen one develop". (R. 75).

After this exchange of remarks, Damschen went on to tell the fellows he thought there were several that really were not satisfied with wages and working conditions and also mentioned his own wages. Conlee asked him where they paid any more for his type of work and he told Conlee at the Newport yard or most any place that they used tractors, and mentioned the fact that a union organizer would be in the following Wednesday and they could have a two-sided meeting. One of the workers suggested taking a vote and getting it over with and Damschen said they could not vote intelligently unless they heard both sides of the story. No vote was taken at the meeting. (R. 76-77).

On Cross Examination this witness testified that Mr. Conlee made a statement that he was not there representing the Company (R. 103), and then testified as follows (R. 104):

Q. He did not say any man would lose his job if he joined the union, did he?
A. He did not.
Q. He did not say that the employees ought not to join the union, did he?
A. Not in them words, no.

Q. Did he say that the Schaefer-Hitchcock Company would close its plant if the employees joined the union?
A. No.
Q. Did he say that the company would curtail operations if the employees joined the union?
A. He did not.
Q. He did not make any threats at all, did he?
A. No.

After the foreman Conlee had finished several employees gave sketches of their opinion of unions. Everything that was said was not in favor of the union (R. 105).

Several of the witnesses testified that the first thing the foreman said at the meeting was to the effect that the Company was not opposed to union labor or to organized labor. (R. 157-171-197-209).

THE DISCHARGE OF CLIFFORD DAMSCHEN:

Patrick J. Conlee, the foreman of the plant, a witness for respondent, testified that he discharged this employee on March 19, 1941. (R. 211); that he made the decision himself without consultation with anyone else (R. 221); and that he hadn't discussed the question of laying Damschen off with Mr. Schaefer, the president of the Company (R. 225). He further testified that the reason he discharged Damschen was because one tractor was laid off and that he did not dis-

charge him because of union activity or because of his membership in a union (R. 213). His testimony in this respect was as follows: (R. 212-213):

Q. Why did you discharge Mr. Damschen from the employment of the Company on March 19, 1941?
A. Well, we laid off one tractor. We were about to lay off one tractor, and Mr. Damschen was chosen as the man to go.

Q. You decided to lay him off instead of others?
A. Yes, sir.

Q. Was your decision to lay him off influenced by reason of any union activity on his part?
A. No, sir, I did not know that he was active.

Q. Was it influenced by anything that occurred at this meeting on February 15, 1941?
A. No, sir.

Q. Did you lay him off or discharge him because of union activity?
A. No, sir.

Q. Or because of his membership in a union?
A. No, sir.

SUMMARY OF ARGUMENT.

1. The finding of the Board that the respondent, by the statements of Con Wear to Webb on February 11, by instigating and holding a meeting on February 15, by the statements of Conlee during this meeting, and by the statements of Con Wear to Damschen about a week

thereafter, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 35) is not supported by substantial evidence, and denies to respondent and to its employees the freedom of speech guaranteed by the First Amendment to the Constitution of the United States.

2. The finding of the Board that the respondent, by discharging Clifford Damschen on March 19, 1941, discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 41) is not supported by substantial evidence.

ARGUMENT.

POINT I.

THE MEETING OF THE EMPLOYEES.

The testimony of the witnesses relating to the calling and holding of the meeting of the employees on Feby. 15, 1941, has been quoted extensively to demonstrate that neither the charges or findings with respect to this meeting are supported by substantial evidence. Instead of showing that the meeting was "instigated" by Respondent, the evidence conclusively establishes that the meeting was the result of spontaneous action on the part of some of the employees. The finding that the meeting was "in-

stigated" by respondent is based on mere assumption, without any proof to support it. The Board assumed that everything these employees did was prompted, suggested or influenced by respondent, and that respondent caused the employees to call and hold the meeting to stop any movement to organize the plant. This assumption was indulged in in spite of the undisputed testimony that two employees, Cronkright and Gillespie, were just as active in arranging for the meeting as was the employee, Con Wear, who is also assumed to have been some kind of a foreman, and that neither the foreman, or any officers or representatives of respondent had any prior knowledge of the meeting.

This state of the record presents questions of grave importance: Have employees the right to oppose the unionizing of a plant, as well as to favor it? Are the statements and actions of employees opposing organization to be charged against the employer as unfair labor practices?

Respondent contends that the employees had the undoubted right as American citizens to take steps to oppose the unionizing of the plant, if they saw fit to do so; that in exercising this right they were not violating any provision of the Act, or any law; and that their actions and statements cannot properly be charged against the employer as interference.

Certainly the statements or actions of employees, even those in a minor supervisory capacity, could not be held to represent the policy of an employer unless it is first shown that the employer had a policy with which such statements and actions were in harmony. In this case there is nothing to indicate any policy on the part of respondent antagonistic to labor unions, or that its officers were opposed to labor unions, or to its employees joining unions. On the contrary, the president of respondent testified that he had been a member of a labor union, and that he was not opposed to labor unions.

The views expressed by the foreman at this informal meeting, which had no chairman, secretary, or other officer, were very moderate, and are unjustly characterized as a "diatribe" in the Board's Brief. He did not show antagonism toward labor unions in general, or toward this union in particular. The testimony of the Board's witness, Damschen, as to the statements made by the foreman at the meeting did not even come close to proving the charge that "at which time the aforesaid officers, agents and employees advised respondent's employees that no benefit would be derived from membership in the union, that respondent's employees should not join the union, that respondent would close its plant or curtail operations if the employees joined or were active in the union, and made other state-

ments derogative to the union." According to the testimony of several witnesses (quoted above) he expressly stated that the company was not opposed to union labor, and Damschen admitted that he stated he was not there representing the company. (R. 103).

In expressing his opinion on the question of the benefits to be derived from the union, the foreman acted within his rights. Such an expression of opinion is within the protection of the First Amendment to the Constitution of the United States.

> "Neither the Act nor the Board's Order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made."
>
> National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 477.

This is the last word of the Supreme Court on this subject, and firmly establishes the principle that mere expressions of opinion on labor policies by an employer, or those held to be his representatives, do not violate the Act. As stated by the Court in the opinion: "The employer in this case is as free now as ever to take any side it may choose on this controversial issue". Here, there was no "course of conduct" amounting to restraint or coercion. There were no other activities of the employer to make the opinions ex-

pressed by the foreman and other employees "amount in connection with other circumstances to coercion within the meaning of the Act". On cross-examination, the Board's witness, Damschen, admitted (R. 104) that the foreman did not make any threats at all, and specifically, that he did not say that the employees should not join the union, or that respondent would close its plant or curtail operations if the employees joined the union, as charged in the complaint. (R. 3)

POINT 2.

THE DISCHARGE OF CLIFFORD DAMSCHEN.

This employee was discharged by the foreman, Conlee, on March 19, 1941, of his own volition, and without consultation with anyone else (R. 211-221). The foreman was sworn and examined as a witness, and testified under oath, that the reason he discharged Damschen was because one tractor was laid off, and he decided to lay him off instead of others (R. 212). He further testified that he did not discharge him because of union activity, or because of his membership in a union (R. 213).

The testimony of the foreman was not contradicted by any witness, or in any manner, and he was not impeached. He was the only person who knew the real cause of discharge. His testi-

mony cannot be disregarded on mere suspicion that he was not telling the truth.

National Labor Relations Board v. Union Mfg. Co., 124 Fed. (2d) 332;

National Labor Relations Board v. Tex-O-Ken, etc., Company, 122 Fed. (2d) 433;

Martel Mills Corporation v. National Labor Relations Board, 114 Fed. (2d) 624-631;

Bussman Mfg. Co. v. National Labor Relations Board, 111 Fed. (2d) 783-787;

Nevada Consolidated Copper Corporation v. National Labor Relations Board, 122 Fed. (2d) 587,

(Reversed by Supreme Court on ground that the findings of fact of the Board were not without support in the evidence.)

National Labor Relations Board v. Nevada Consolidated Copper Corporation, 62 S. Ct. 960)

The evidence concerning the discharge of Damschen was insufficient to constitute an unfair labor practice under Sec. 8 (3) of the Act, because of the absence of proof that the discharge was for the purpose, or had the effect, of encouraging or discouraging membership in a labor organization.

U. S. C. A. Title 29, Sec. 158 (3)
(Sec. 8 (3) National Labor Relations Act).
Stonewall Cotton Mills, Inc. v. National Labor Relations Board, —Fed. (2d) —, decided June 3, 1942 by U. S. Circuit Court of Appeals, Fifth Circuit (Not yet reported)

In the above case the Court stated in the opinion:

> "An employee, though he belongs to or is an officer of a union, may, like any other employee, be discharged for any reason or for no reason at all, unless it is for a reason prohibited by the Act. It must be borne in mind that this charge is not sustained by evidence and a finding merely that persons were discharged because of their union activity. To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review."
>
> Stonewall Cotton Mills, Inc. v. National Labor Relations Board, *supra*
>
> Citing N. L. R. B. v. Air Associates, 121 Fed. (2d) @ 592.

That the discharge of Damschen on March 19, did not have the effect of discouraging membership in the union is apparent from the attitude of the employees. Damschen testified that at the meeting of the employees held on February 15 "several gave short sketches of their opinion of unions, all not in favor of the union. Everything that was said was not in favor of the union". (R. 105), and that at the union meeting on Wednesday following the employees meeting "no one from the yard except myself showed up" (R. 107). Not a single employee showed up although they had all been

invited. (R. 107). The effort to unionize the plant had completely collapsed more than a month before his discharge, because of the opposition of the employees. The foreman did not know that Damschen had become a member of the union; that anything had been done toward organizing a union at the plant during that period; or that Damschen had been active in the union at the time he discharged him. (R. 212) His testimony to this effect was not disputed. Damschen admitted that he took no further action toward holding meetings, but claimed only that he "went on talking union". (R. 107) There is no evidence that Conlee had knowledge of such "talking", or that it influenced him in making his decision.

CONCLUSION

The controlling findings of the Board are not based on substantial evidence, but on mere suspicion and conjecture. The order is therefore invalid, and should not be enforced.

Respectfully submitted.

C. H. Potts.
Attorney for Respondent.

APPENDIX

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SEC. 8 (3), NATIONAL LABOR RELATIONS ACT. U. S. C. A. TITLE 29, SEC. 158 (3).

It shall be unfair labor practice for an employer—

---

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *******